TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

October Term, 1979

Nos.: 79-824, 79-825, 79-826, 79-827

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
INSILCO BROADCASTING CORPORATION, et al.,
AMERICAN BROADCASTING COMPANIES, INC. et al.,
NATIONAL ASSOCIATION OF BROADCASTERS, et al.,
Petitioners,

-v.-

WNCN LISTENERS GUILD, et al.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT BRIEF IN OPPOSITION FOR RESPONDENTS WNCN LISTENERS GUILD, INC., CITIZENS COMMUNICATIONS CENTER, CLASSICAL RADIO FOR CONNECTICUT, INC. AND COMMITTEE FOR COMMUNITY ACCESS

Respondents WNCN Listeners Guild, Inc. and Citizens Communications Center, and Respondents Classical Radio for Connecticut, Inc. and Committee for Community Access respectfully request that this Court deny the petitions for writs of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. On December 12, 1979, the Clerk of this Court granted an extension of time within which to file a response or responses to the petitions for writs of certiorari to and including February 6, 1980.

Opinions Below

The full texts of the opinion of the Court of Appeals (not yet officially reported), and the Notice of Inquiry (reported at 57 F.C.C.2d 580) and Orders (reported at 60 F.C.C.2d 858 and 66 F.C.C.2d 78) of the Federal Communications Commission are printed in the appendices to the Petition for Writ of Certiorari filed by Petitioners Federal Communications Commission and United States of America in No. 79-824. For convenience, references to those opinions and orders will be cited to the FCC's appendices ("FCC App.").

Statutes Involved

Sections 309(a), (d) and (e) and 310(d) of the Communications Act of 1934 (the "Act") are reprinted as Appendix B to this Brief.

Question Presented

For the reasons set forth below, respondents believe that a grant of certiorari is not warranted in the present case.

In the event, however, that this Court should decide to grant certiorari, respondents respectfully request that, in lieu of the questions propounded by petitioners, all of which implicitly or explicitly misstate the holding of the Court of Appeals, such grant be limited to the following question:

Whether the Court of Appeals correctly held that the Federal Communications Commission, in determining whether the assignment or renewal of a broadcasting license would serve the "public interest, convenience and necessity" as required by the Communications Act of 1934, must consider the public interest effect upon diversity of the loss by a community of its only source of a financially viable type of specialized programming, and that a public hearing is required by the Communi-

cations Act where there is any substantial and material question of fact relating to such loss or its impact upon the public interest.

Counterstatement

Introduction

Whether or not to grant certiorari in any cases including this one, must ultimately turn on the question of what is to be reviewed. Only after the issue is framed, may this Court determine its importance in terms of impact, resolution of unsettled questions or conflicts in the Circuits, and the like.

All the petitioners in the instant case have recognized this obvious fact. All have endeavored, with greater or lesser degrees of poetic or other license, to present as the "issues" to be reviewed, questions of apparently enormous importance regarding the relationship of courts to administrative agencies[1] and dangerously threatened First Amendment values.[2]

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[1] The questions presented by the various petitioners on this issue may be summarized and paraphrased as

> "Did the Court of Appeals improperly substitute its own factual premises and policy views for the Commission's expert determination that the regulation of radio formats is unnecessary and in fact detrimental to the public interest, and did it abridge the Commission's discretion in determining how to achieve diversity of radio programming." *See, e.g.*, Petition of Insilco Broadcasting Corp. at 3 ("Insilco Pet."); Petition of National Association of Broadcasters at 2 ("NAB Pet.").

In fact, however it may be phrased, the question they really ask is whether this is *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) ("NCCB") revisited. As we shall demonstrate, it most clearly and unequivocally is not. *See, e.g.*, Note 66, p. 27 *infra*.

[2] The questions presented here include whether the Court of Appeals has unconstitutionally required "government dictation of artistic and journalistic radio formats" and "government prescription and prohibition of radio programming." NAB Pet. at 2-3. Again, these questions bear no relation to the case actually before this Court.

In fact, the issue presented by the Court of Appeals decision is far more modest, and entirely unexceptional in its articulated adherence to 40 years of this Court's interpretation of the Communications Act of 1934.[3] Far from imposing new rules or policies on the Commission, the Court of Appeals decision was no more than a continued direction to the Commission to fulfill its statutorily mandated obligation to make a public interest determination weighing the effect of abandonment of a unique format in certain extremely limited circumstances. The Court's direction demanded no particular result. It required only that in appropriate individual cases the Commission must "take a look" and make its own determination.[4]

There has never been any real question that the public interest standard includes diversity of programming. The Commission has accepted and acted upon this notion in a variety of other contexts, and accepts it here. The problem with the Commission's *Policy Statement*[5] was its inexplicable, flat and unequivocal refusal to "look" at the public interest in diversity when an application proposing abandonment of a unique, financially viable format[6] was before it.

The Commission's reason, from the first decided case through the Inquiry reviewed below, has been its belief that marketplace forces do the job of promoting diversity as well, if not better than the Commission itself can.

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[3] 47 U.S.C. §§ 151 *et seq.* (1976) (the "Act").

[4] This is, of course, the major and controlling difference between the instant case and *NCCB*.

[5] *Memorandum Opinion and Order* in Docket No. 20682, 60 F.C.C.2d 858 (1976), FCC App. 117a (the "*Policy Statement*").

[6] While the decided cases have involved primarily "musical" entertainment formats, the same principles hold for informational, educational and, of course, foreign language formats.

Although the Commission recognizes that the marketplace occasionally fails,[7] it has insisted on absolute deference to free competition, and has flatly and unequivocally refused to engage in any regulatory behavior - again, in short, it has refused even to take the "look" necessary to determine whether the public interest will be served by granting a particular assignment or renewal application.

The decision of the Court of Appeals simply restates, with abundant citation to decisions of this Court and the Communications Act itself, that in enacting the Communications Act, Congress specifically eschewed the notion that unbridled competition was consistent with the public interest. Instead, it undertook a regulatory licensing scheme which would provide a means for assuring that, in each instance, the public interest was preferred over that of private parties, however competitive. Accordingly, the Court of Appeals has simply reinstructed the Commission that it may not, consistent with the statute and this Court's exegesis, abdicate all responsibility in assessing entertainment formats to the marketplace, and, in addition, that an outright refusal to make a public interest determination in a particular case is an impermissible abdication of its obligation under the statute.

In order to understand what both the Commission and the Court of Appeals actually did, as opposed to what petitioners have freely characterized them as having done, it is useful to review in some detail not only the two decisions below, but the history of format cases which led to this "unseemly and unnecessary confrontation" between the Commission and the Court of Appeals and which, as Commissioner Fogarty wrote,[8] makes this case so inappropriate for Supreme Court review.

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[7] *E.g.*, *Policy Statement*, FCC App. at 128a. It is, of course, only when such marketplace failure happens that the unique format issue arises.

[8] Fogarty, C., dissenting from the Commission decision to seek certiorari in this case. A copy of Commissioner Fogarty's dissent is attached as Appendix A to this Brief, and will hereafter be cited by the prefix "A" followed by the appropriate page number.

The Format Cases - *Atlanta* to *WEFM*

In August of 1969, the Commission granted, without a hearing, a contested[9] application for assignment of an Atlanta radio station, WGKA, refusing to weigh the effect on the public interest of the assignee's proposed format change from classical music to "easy listening." A survey demonstrated that some 16% of Atlanta listeners preferred classical music, which was available only on WGKA, while the proposed format duplicated one which was already broadcast on a number of stations.

On October 30, 1970, the Court of Appeals reversed the Commission and remanded for an evidentiary hearing as to a number of issues. *Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-AM and FM) v. FCC*, 436 F.2d 263 (D.C. Cir. 1970) (hereinafter *"Atlanta"*). The Court held that because the public interest standard of the Communications Act clearly includes diversity of programming, the listening preferences of a substantial minority audience must be weighed in determining an assignment application which would deprive that audience of a unique format.

In the four years after its decision in *Atlanta*, the Commission was confronted with four more assignment

[9] The proposed assignment was contested in a petition for reconsideration filed by the first of a number of listeners' groups which were heard by the Commission and the courts since the decision in *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (*"United Church of Christ I"*) which granted standing to citizens' groups functioning as "private attorneys general."

applications where citizens groups raised the issue of the loss of a unique format.[10]

In two of them, no material issues of fact were raised,[11] one went to the Court of Appeals on a stay application.[12] The fourth was *Progressive Rock*, where material issues were raised as to the uniqueness and financial viability of a format sought to be abandoned, but the Commission granted the assignment application without a hearing on those disputed facts and legal issues. The D.C. Circuit, on appeal, again explained to the Commission that format changes affecting diversity must be treated no differently than any other element affecting the public interest - *i.e.*, if there are factual

[10] These were *Citizens Committee to Preserve the Present Programming of WONO (FM) v. FCC*, 71-1336 (D.C. Cir. May 13, 1971) (summary reversal on application for stay) (hereinafter *"WONO"*); *Twin States Broadcasting, Inc.*, 35 F.C.C.2d 969 (1972), *rev'd. sub nom. Citizens Committee to Keep Progressive Rock (WGLN-FM) v. FCC*, 478 F.2d 926 (D.C. Cir. 1973) (hereinafter *"Progressive Rock"*); *Charles A. Haskell*, 36 F.C.C.2d 78 (1972), *aff'd. sub nom. Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973) ((hereinafter *"Lakewood"*); and *RKO General, Inc.*, 23 RAD. REG. (P & F) 930, *aff'd. sub nom. Hartford Communications Committee v. FCC*, 467 F.2d 408 (D.C. Cir. 1972) (hereinafter *"Hartford"*).

[11] In *Lakewood*, the D.C. Circuit agreed that there was no dispute that the format to be abandoned was not unique, and so affirmed the Commission's grant of the proposed assignment. In *Hartford*, similarly, there was no substantial factual dispute about the uniqueness of a format (which was only diminished, not abandoned) or about financial qualifications, and the D.C. Circuit affirmed the Commission's order granting assignment without a hearing.

[12] *WONO*, *supra*.

disputes a hearing must be held; if there are no factual disputes, it need not.[13]

The *WEFM* Decision

In 1973, confronted with a petition to deny an assignment application which allegedly would have eliminated a unique classical music format in Chicago, the Commission again refused to hold a hearing.[14] Denying a petition for reconsideration, a majority of Commissioners also issued a separate "policy statement" in which they stated their belief that the efficacy of market forces in the area of entertainment formats made it both unwise and essentially unnecessary for the Commission to consider a format issue where it was raised in a petition to deny. *Zenith Broadcasting Corp.*, 40 F.C.C.2d 223, 230 (1973).[15]

On appeal, the Commission's order was initially affirmed, on the ground that there were no contested issues of fact requiring a hearing,[16] Judge Fahy dissenting. *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974). On rehearing *en banc* the D.C. Circuit reversed,[17] confronting the Commission's *Burch State-*

[13] The Court noted what was becoming a seemingly intransigent position by the Commission regarding the refusal to consider this diversity issue in licensing proceedings, and wrote

> "It is our distinct impression...that the Commission desires as limiting an interpretation [of *Atlanta*] as possible. We suspect, not altogether facetiously, that the Commission would be more than willing to limit the precedential effect of [*Atlanta*] to cases involving Atlanta classical music stations." *Progressive Rock, supra*, 478 F.2d at 930.

[14] *Zenith Broadcasting Corp.*, 38 F.C.C.2d 838 (1972).

[15] This was the *Additional Views of Chairman Burch In Which Commissioners Robert E. Lee, H. Rex Lee, Reid, Wiley and Hooks join* (hereinafter the *"Burch Statement"*).

[16] Writing for the majority, Chief Judge Bazelon found that the entire listening area served by WEFM was served by another classical music station; accordingly, he held, there was no substantial issue of fact requiring a hearing on the diversity point.

[17] *Id.* at 252 (*en banc*). The *en banc* decision will be cited hereinafter as *"WEFM"*.

ment by reviewing its prior decisions from *Atlanta* to *Progressive Rock*, and placing them squarely in a statutory analysis of § 309(a), (d)(1) and (d)(2) of the Communications Act.[18]

Since both the Act and the Commission's prior policies clearly included diversity of programming within the public interest standard,[19] the Court again admonished the Commission to fulfill its § 309 obligation to hold a hearing where there were material facts concerning the loss of diversity from the abandonment of a unique format.[20]

[18] Section 309(e) *requires* the Commission to hold a hearing where a "substantial and material question of fact" is presented to the Commission while the Commission is making a statutorily required public interest determination.

[19] Section 303(g) of the Act makes clear that the public interest to be served is the interest of the listening public in "the larger and more effective use of radio." This view of the statute was reiterated by this Court in, *inter alia*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943), where Mr. Justice Frankfurter wrote that "the avowed aim" of the Act was "to secure the maximum benefits of radio to all the people of the United States." *Id.* In his concurring opinion in *WEFM*, Judge Bazelon pointed to a consistent line of Commission licensing decisions where the "uniqueness" or contribution to diversity of proposed programming had been considered by the Commission. *WEFM, supra*, 506 F.2d at 280, n. 63 (concurring opinion) and cases cited therein.

[20] "When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest." *WEFM, supra*, 506 F.2d at 262.

The Court made it clear how seldom this would actually occur by listing a number of factors to be considered. These included a requirement of substantial public grumbling about the proposed change,[21] the financial viability of the format sought to be abandoned,[22] and the absence of any substitutes for that format in the licensee's service area. Only where there were material facts in dispute[23] did the Commission need to hold a hearing, and then, of course, it was totally free to make whatever determination of the public interest it saw fit.

The Commission Inquiry on Changes in the Entertainment Formats of Broadcast Stations

The Commission chose not to seek this Court's review of the *WEFM* decision, but rather determined

[21] If there were no such grumbling, the Commission would never even have occasion to consider the remaining questions, thus insuring that only questions which truly had a significant public interest impact on a substantial portion of the listening audience need be considered. In addition, since it is the "substantial public grumbling" which triggers the Commission's obligation to look, the hyperbole about wide ranging, day-to-day censorship which appears in some of the petitions for certiorari is unwarranted and untrue.

[22] No one, and certainly not the Court of Appeals, has ever suggested that a licensee must retain a format which is not financially viable.

[23] Of course, under applicable law and Commission rules, such disputes can arise only on the basis of affidavits of persons having actual knowledge of the facts, *see* 47 U.S.C. § 309(d)(1) (1976), not on mere allegations. This too is clearly a limiting factor.

to institute an "Inquiry" into whether or not it should follow that decision.[24] FCC App. 66a *et seq.*

In engaging in this entirely unorthodox and essentially illegal enterprise,[25] the Commission demonstrated that its past resistance and enduring concern were based on a total misreading of what the Court of Appeals had done.[26] It paraphrased the *WEFM* decision[27] as presenting the question

> "Whether the public interest standard of the Communications Act of 1934, as amended, requires *close scrutiny of broadcast entertainment formats to assure an appropriate diversity?*" *Notice of Inquiry*, Para. 8, FCC App. 65a. (emphasis added).

[24] Commissioner Hooks concurred in the *Notice of Inquiry* insofar as it heralded an attempt to devise regulations for effectuating the *WEFM* decision. Significantly, he wrote,

> "I was one of those who joined former Chairman Dean Burch's statement in *WEFM* wherein we expressed a natural dread of becoming too deeply enmeshed in format choices. But, after reading again the decisions in the so-called 'format cases,' and, however loathe we personally may be to lay hands on the format porcupine, the final responsibility of assuring service to all segments of the community may ineluctably abide here." FCC App. at 78a-79a (footnotes omitted).

[25] As the Court of Appeals pointed out, within our system of constitutional government a reviewing court's interpretation of a statute is clearly binding on an administrative agency - only a higher court or Congress has the power to reverse or modify the reviewing court's decision. *WNCN*, FCC App. 32a-33a.

[26] The Court of Appeals wrote, "The Commission would likely have been less concerned had it read our format cases more accurately." *WNCN*, FCC App. 27a.

[27] The Commission also described the results of the Court's decision as

> "rejecting the programming choices of individual broadcasters in favor of a system of pervasive government regulation." FCC App. 65a.

This, of course, was nothing like what the Court of Appeals had decided,[28] but the Commission proceeded to answer its own question in a proceeding which was as fraught with error as its phrasing of the question had been.

The Inquiry, from its inception to its conclusion, cannot be even charitably characterized as anything other than a sham. The *Notice* made abundantly clear that the Commission had entirely prejudged the issue,[29] and nothing which occurred subsequently cast any doubt upon that understanding.[30]

The record of the Inquiry is filled with procedural irregularities, violations of the Administrative Procedure Act (the "A.P.A."), and a generally impermissible attitude of "hostility and impatience"[31] toward public

[28] Clearly the Court's decision did not require "close scrutiny of broadcast entertainment formats" in general, since it was based entirely upon the requirement of a hearing only in very carefully delineated circumstances. Further, the Court of Appeals never even suggested that the Commission should generally *assure* diversity, but rather held only that in the same carefully delineated circumstances, it should look only at whether the loss of a particular format in a particular assignment situation would substantially *decrease* diversity.

[29] The Commission wrote that

> "...the course charted by the Court may lead only to expense, delay and stagnation, with no assurance that a decision finally reached by the Commission would be in any sense superior to (or more in the public interest than) that favored by the marketplace." FCC App. 69a.

[30] The language and reasoning of the Commission's *Policy Statement* almost exactly mirror that of the *Notice of Inquiry*. Compare *Notice of Inquiry*, FCC App. 69a to *Policy Statement*, FCC App. 131a (public tastes subject to rapid change); *Notice of Inquiry*, FCC App. 68a to *Policy Statement*, FCC App. 128a (Commission's recognition that the marketplace is not perfect); *Notice of Inquiry*, FCC App. 68a to *Policy Statement*, FCC App. 130a (government supervision would be injurious to public interest).

[31] Mr. Chief Justice, then Judge, Burger, rightly condemned such "hostility and impatience to Public Intervenors" in *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 548-550 (D.C. Cir. 1969) ("*United Church of Christ II*").

interest groups.[32] Taken together, these errors of the Commission would have constituted independent grounds for reversal of its decision.[33] However, rather than individually enumerating and discussing each of those improprieties, respondents will discuss one clear violation of the A.P.A. and procedural due process - the Commission's reliance on "secret studies" - which both exemplifies[34] and poisons the record of the Commission's Inquiry.[35]

[32] For example, no motions for extensions of time clearly needed by understaffed and underfinanced citizens' groups were granted, while all requests for procedural relief made by broadcasters were. This was particularly acute in the matter of reply comments; since most out-of-town citizens' groups were unable to go to Washington to review the contents of comments which had been filed, they requested a brief extension until shortly after the scheduled publication of the issue of *Access* magazine which was to summarize these comments. The motion was denied, and, as a result, not one out-of-town group filed reply comments, though virtually all the broadcasters and industry groups did.

[33] The Court of Appeals did not find it necessary to so hold, since it found so many other flaws in the Commission's decision. Judge Bazelon, who did not share the majority's view as to some of those flaws would, however, have reversed and remanded solely on the basis of *one* of the procedural errors - the "secret studies" - alleged by the public interest groups on appeal.

[34] Respondents in no way concede that other errors, or the procedural record as a whole, did not also justify reversal below. These errors also make this an inappropriate record upon which to grant certiorari.

[35] See Dissenting Statement of Commissioner Fogarty, 1a-2a. Judge Bazelon, concurring below, found the "secret studies" issue sufficient, in and of itself, to require reversal and remand. FCC App. 41a.

Procedural Error - The "Secret Studies"

Early in the proceeding, Citizens Communications Center ("Citizens")[36] filed a pleading[37] calling upon the Commission to carry out or contract for a study which would provide empirical data on existing formats, changes which had occurred before and after *Atlanta* and *WEFM*, ownership and finances of radio stations in the major markets, and other information critical to the *Notice's* assumptions and the Commission's ultimate determination.[38] In denying that pleading, the Commission clearly stated its view that no such study was necessary.[39]

Citizens then filed a Freedom of Information Act ("FOIA") request for data underlying the assumptions in

[36] Citizens is a public interest law firm specializing in communications law which has itself been a party or otherwise involved in several major cases before the D.C. Circuit and this Court. It was a party-petitioner in the Court of Appeals, and is one of the Respondents in the instant petitions.

[37] The Petition to Reconsider, Rescind, Suspend or Redirect Inquiry pointed out that the Inquiry was no more than an attempt to overturn the Court of Appeals decision by appealing it not to this Court or Congress, but to the broadcasters. In addition to the request for an empirical study, it asked, *inter alia*, for the Commission to "undertake affirmative measures to involve local participants" which, of course the Commission never did. (JA145 *et seq.*) (JA refers to the Joint Appendix filed in the Court of Appeals. A copy of this has been lodged with the Clerk of this Court for its convenience.)

[38] In the alternative, Citizens asked for sufficient time to allow listeners to conduct such studies themselves, to the extent that resources and information were available to them. It also requested reimbursement to such groups if the Commission declined to make or contract for the requisite studies.

[39] The Commission left open the possibility of calling for such a study after all the comments were in, if those comments did not provide satisfactory data upon which to make a decision (JA 169).

the Commission's *Notice of Inquiry*. The response was essentially that there was no such data (JA 52).[40]

Following the filing of comments (which were, of course, heavily dominated by the industry), Citizens moved for a two-month extension for replies, again citing the need for an independent market study (JA 237). Again the motion was denied with no response to the request for a study (JA 248).

When, however, the Commission finally issued its *Policy Statement* refusing to follow *WEFM*, the Commission relied heavily[41] on two "staff studies" which purported to demonstrate the adequacy of the marketplace in providing "a bewildering diversity of formats" and in providing maximum "consumer satisfaction."[42] The conclusion of the studies was attached as an exhibit to the *Policy Statement*, FCC App. 156a, but the data from which they were derived was not.

The existence of these studies, much less the probability that the Commission would rely on them, had been entirely unknown prior to the issuance of the *Policy Statement*. This critical point was made by the WNCN Listeners Guild (the "Guild") in a petition for

[40] The *Notice* had included an Appendix purporting to show the diversity of formats existing in three major markets; the FOIA response explained that this "data" was obtained from *Broadcasting Yearbook*, an industry publication. Even this incredibly limited and inherently meaningless "data" was inaccurate since, as Citizens pointed out, the list failed to include an all-jazz format in New York after the Commission had been asked to review a transfer application seeking to abandon that very unique format!

[41] The Commission's reliance on these studies is seen both in its own *Policy Statement*, FCC App. 129a, and in the Court of Appeals opinion, FCC App. 14a and 41a (concurring op. of Bazelon, J.).

[42] The substitution of the term - and notion - of "consumer satisfaction" for the statutory standard of the public interest is unprecedented, unexplained, and incorrect.

reconsideration[43] which requested an opportunity to respond to the studies once the underlying data was made available.

Simultaneously, Citizens filed an FOIA request for that data so that the public might be able to analyze and criticize the studies and their conclusions (JA 68).[44] Citizens also wrote to the Commission requesting that the Inquiry be reopened until the FOIA request was resolved, and the public given an opportunity to comment (JA 70).

Although the Commission responded to the FOIA request by turning over numerous pages of virtually unintelligible computer print-outs,[45] it did so substantially after the time for filing petitions for reconsideration had

[43] The Commission allows petitions for reconsideration to be filed within 30 days of a decision. 47 CFR § 1.106(f) (1978). The standard of persuasion on such petitions is, by regulation, far greater than in the initial proceeding. 47 CFR § 1.106(c) (1978).

Nevertheless, a number of groups asked the Commission to reconsider its decision, some on the ground that although they were vitally interested in the issue, and had valuable and relevant information and insights to offer, they had not even known of the existence of the Inquiry until the decision was announced. *See, e.g.*, JA 381. Their requests were, of course, ultimately denied. Other petitions for reconsideration alleged that their timely comments had never been considered and did not appear on the list of "Parties Filing Comments" attached to the *Policy Statement* (JA 392), or that the Commission had failed to send a copy of the *Notice of Inquiry* although specifically asked to do so (JA 350).

[44] The FOIA request also asked for

> "...any materials which show the date on which the study was first requested within the Commission, the circumstances surrounding such institution of the study, and the dates covered by the study." (JA 68).

[45] In a subsequent letter to the Commission, Citizens pointed out that the material furnished was totally useless in and of itself (JA 100), a fact with which the Court of Appeals, viewing the print-outs (JA 76-87), quite reasonably agreed.

passed.[46] Citizens appealed the overly limited response to its FOIA request;[47] on November 24, 1976 the Commission denied the appeal.

In March of 1977, Citizens wrote to the Commission stating that it and other public interest groups were entirely unable to do any analysis of the studies because

> "...the Commission failed to provide a directory to explain what the data in the computerized print-out means" (JA 100).

Sometime thereafter, with the actual date the subject of extreme and unresolved controversy,[48] the Commission placed a "Description of the Data Base" in its files. It is, however, undisputed that this was done long after the time for filing for reconsideration was past; this time was never extended, since the Commission refused to grant Citizens' previously described request to reopen or hold the Inquiry open until the studies had been commented upon.

[46] The exact timing is not clear, as is the case with so many critical facts in this record. The Commission's "answer" is dated Sept. 15, 1976 (2 weeks after the deadline for reconsideration) but the computer print-out material placed in its public file, reproduced in the Joint Appendix below, bears the date Dec. 6, 1976 on every page (JA 76-87).

[47] For example, the Commission declined to furnish any information about when the studies had been made, or who had made them (JA 73). *See* note 44 *supra*.

[48] The Commission claims to have done this on March 30, 1977, and produced a letter to that effect at oral argument. The letter was not, however, part of the Appendix, and no one from Citizens had ever seen it prior to argument. No public interest group, including any of the respondents here, had ever seen the "Description" until the Commission had placed it at the end of the second volume of the Joint Appendix. Significantly, the "Description" does not appear in the Certified List of Documents filed with the Court of Appeals in the late fall of 1977, after the Commission's final order denying reconsideration.

This somewhat tortuous history of the "secret studies" is included both to demonstrate the complete procedural unfairness[49] of the Inquiry, and the total lack of any acceptable evidence[50] upon which the Commission based its *Policy Statement*.

The *Policy Statement*

Given the *Notice of Inquiry*, the *Policy Statement* contained no surprises.[51] It reiterated its faith in marketplace economics to maximize diversity (FCC App. 128a and 130a), although it admitted that there were clearly instances in which the market forces failed (FCC App. 128a). *See also* FCC App. 66a.

The Commission had clearly recognized that diversity in programming was correctly included in the public interest standard of the Act (*e.g.* FCC App. 71a), but it now flatly refused to consider that aspect of the public interest in assignment applications where the marketplace

[49] And, of course, violation of the A.P.A.'s "notice and comment" requirements, *see* discussion at pp. 31-35 *infra*.

[50] Since the evidence was never "tested" by criticism and comment, it was, under the A.P.A., court decisions and general principles of administrative law, an improper and inadequate ground upon which to base any decision. *Id.*

[51] Commissioner Robinson filed a separate statement in which he expressed his view that, pursuant to the notion of judicial supremacy, the Commission was required to follow the Court of Appeals determination on review, whatever that decision might be.

Commissioner Hooks dissented, stating, *inter alia*,

> "I do dissent because, without suggesting an alternative response to minority format abandonment, the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not. In this Republic, the role of regulation of commerce has been to offset and remedy errant or inefficient market forces. The Commission's role in the commercial regulatory structure is well defined." FCC App. 171a (footnote omitted).

had demonstrably failed.[52] In support of its absolute refusal to make the requisite public interest inquiry in those few cases, the Commission offered three reasons. They were:

> 1) To do so would impose "common carrier type" obligations on the licensees in violation of *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (*"CBS"*) (FCC App. 119a-123a),
>
> 2) To do so would involve the Commission in an "administrative nightmare" (FCC App. 131a-132a), and
>
> 3) To do so would have a chilling effect on broadcasters' programming choices in violation of the First Amendment[53] (FCC App. 132a-133a).

[52] It wrote,

> "The Commission has indicated that it would take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming. *Zenith Radio Corporation*, 40 F.C.C.2d at 231. Having given the entire matter further study, however, we have concluded that such a position is neither administratively tenable nor necessary in the public interest. Rather, as discussed herein, we believe that the market is the allocation mechanism of preference for entertainment formats, and that Commission supervision in this area will not be conducive either to producing program diversity nor satisfied radio listeners." FCC App. 134a.

[53] The Commission inexplicably wrote, essentially without any analysis, and with no factual record to support, that following the *WEFM* decision would

> "resul[t] in an inhibition of constitutionally protected forms of communication with no off-setting justifications, either in terms of specific First Amendment or diversity-related values or in broader public interest terms." FCC App. 133a.

The Court of Appeals Decision

The justifications for abandonment of its clear statutory duty offered by the Commission were reviewed under ordinary principles of administrative law by the Court of Appeals, again sitting *en banc*. Applying those principles, it found the Commission's decision fatally lacking in both rationality and impartiality. The former characterization derived from its analysis of the Commission's stated reasons for abandoning the statutory scheme, an analysis premised upon an unbroken line of decisions by this Court,[54] the latter derived from numerous procedural violations,[55] including the previously discussed "secret studies" (FCC App. 14a-17a). The Court's discussions of the Commission's articulated reasons require only brief discussion here.

1) First, as to the Commission's claim that the record showed

> "...how effective the tool of competition has been in carrying out Congress' plan for entertainment programming..."

the Court found that insofar as the record relied on primarily consisted of the unreleased, untested secret staff studies, that record was legally inadequate (FCC App. 15a).[56] Also, as a legal matter, the

> "...finding that the degree of variation in audience share among stations programming the same format was as great as the variation among stations programming different formats..."

[54] *See* discussion at pp. 24-27, *infra*.

[55] The Court also noted, *inter alia*, the Commission's total failure to have considered many of the comments filed by public interest groups, particularly as those comments had, in good faith, responded to the Commission's rhetorical inquiries as to how it might possibly implement the format decisions - if, of course, it chose to do so. FCC App. 22a-23a. Such failure is also arguably a fatal violation of § 553 of the A.P.A.

[56] The serious procedural infirmity also diminished any assurance that the Commission's decision was "substantially accurate." *Id.*

is ultimately entirely irrelevant to the question of whether the Act requires the Commission to look at the loss of diversity in the threatened abandonment of a unique format (*i.e.*, when market forces *fail* to preserve or maximize diversity) in the context of a required public interest[57] finding.

2) The "administrative nightmare" stressed by the Commission in its *Policy Statement* and briefs to the Court of Appeals was conceded by counsel at oral argument to be an "exaggeration" and not "very significant at all" (FCC App. 20a); a voluntary but necessary characterization which the Court of Appeals determined was amply supported by an examination of the actual burdens imposed on the Commission by the format cases since *Atlanta*[58] (FCC App. 18a).

The Court also noted that the extent to which the Commission's *Policy Statement* laid so much stress[59] on an argument which was so lacking in actual merit was another factor "casting considerable suspicion on the rationality of that decision" (FCC App. 20a).

3) The Court of Appeals found that the common carrier argument was, based on this Court's decisions, legally incorrect. Both *CBS* and *FCC v. Midwest Video Corp.*, _____U.S._____, 99 S.Ct. 1435 (1979), discussed "common-carrier like obligations" as involving the require-

[57] Again we note that the Commission's apparent confusion of "consumer satisfaction" with the "public interest, convenience and necessity" may have played a large part in its misunderstanding of the statutory issue.

[58] In ten years, only a handful of cases reached the Court of Appeals; only one, *WEFM*, actually resulted in a hearing (and that case was settled before any appeals) and only a handful are presently pending. FCC App. 18a-20a.

[59] The Court aptly characterized the language of the briefs and decisions on this issue as "almost frenzied rhetorical excess." FCC App. 20a.

ment of some form of private access - not the requirement which has been upheld since the beginning of the Act that licensees are, as a condition of their licenses, required to provide programming which serves the public interest, *see e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (*"Red Lion"*).

4) The Court of Appeals found that the Commission's First Amendment fears were also premised on a "drastic misreading of the format cases" (FCC App. 23a).[60] Rather than requiring pervasive, comprehensive governmental inquiry in *choosing* all formats, those decisions required no more review of programming in limited individual circumstances than has been repeatedly recognized as consistent with, and indeed required by the Communications Act.[61]

The Court of Appeals reviewed the record for evidence of the Commission's oft-stated contention that the format decisions would deter experimentation and innovation and found none - the Commission's own study, to the contrary,

> "concluded that under the *WEFM* regime licensees have been aggressive in developing diverse entertainment formats" (FCC App. 25a).

[60] As the Court of Appeals wrote, the Commission

"analyzed the problem in stark terms: formats are to be chosen either by market forces or by 'the alternative to the imperfect system of free competition...a system of broadcast programming by government decree.' Denial of Reconsideration, *supra*, 66 F.C.C.2d at 81. *WEFM*, in the Commission's view, is the antithesis of the free market: it mandates a "system of pervasive governmental regulation," Notice of Inquiry, *supra*, 57 F.C.C.2d at 582, requiring 'comprehensive, discriminating, and continuing state surveillance.' Policy Statement, *supra*, 60 F.C.C.2d at 865, citing *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)." FCC App. 23a

[61] *See* discussion *infra* at pp. 24-31

Finally, the Court emphasized the narrowness of the Commission's powers under *WEFM*, a limitation which falls well within the First Amendment broadcast decisions of this Court. It reiterated that the Commission

> "...merely has the power to take a station's format into consideration in deciding *whether to grant certain applications*. It has no authority under *WEFM* to interfere with licensee programming choices: it cannot restrain the broadcasting of any program, dictate adoption of a new format, force retention of an existing format, or command provision of access to non-licensees. To say that it is empowered to impose censorship or common carrier obligations is to stretch *WEFM* virtually beyond recognition." FCC App. 25a (footnotes omitted) (emphasis added).

Reasons Why the Writs Should be Denied

I

The Decision of the Court of Appeals Is Premised Upon and Compelled by the Communications Act and This Court's Consistent Interpretations of That Act

The decision below, like the prior format cases, is nothing more than a straightforward implementation of the regulatory scheme which Congress adopted in the Radio Act of 1927 and later the Communications Act of 1934, and which this Court has articulated in over forty years of decisions. The holdings of those decisions have clearly and consistently reiterated that Congress rejected reliance on competition alone as the basis for allocation and exploitation of the electromagnetic spectrum.[62] Instead, as this Court has also repeatedly held, Congress enacted a comprehensive regulatory scheme based upon licensing the use of radio frequencies. The

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[62] As Justice Frankfurter wrote in one of his definitive explications of the Communications Act,

> "Indeed, as to the industry before us in this case, there has been serious qualification of competition as the regulating mechanism. The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications. The Act by its terms prohibits competition by those whose entry does not satisfy the 'public interest' standard....
>
> • • • •
>
> "Of course, the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest necessarily requires in each case a blend of private forces and public intervention.
>
> • • • •
>
> "...Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough." *FCC v. RCA Communications Inc.*, 346 U.S. 86, 93-94, 97 (1953) ("*RCA*")

licensing scheme imposed an obligation on the FCC to make choices among prospective licensees,[63] and to regulate those licensees consistent with the "public interest, convenience and necessity."[64]

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[63] For example, as Justice Frankfurter wrote in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) ("*NBC*")

> "The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.
>
> "The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience, or necessity'...." *Id.* at 215-216.

[64] As early as 1928 the Federal Radio Commission, the predecessor to the present Commission, wrote

> "Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser." Federal Radio Commission, *Second Annual Report* 169-70 (1928), quoted with approval in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 139 n. 2 (1940)

A more recent, and oft-quoted reiteration of the paramount interest of listeners and viewers is found in *Red Lion*, 395 U.S. at 390. *See* note 74, p. 31, *infra*.

Under the Act, applications for all licenses, license renewals, and license assignments must be made to the Commission. 47 U.S.C. §§ 308 (a), 310(d) (1976). In determining whether to grant any such application, the Commission *must* make a finding that the public interest, convenience and necessity would be served thereby. 47 U.S.C. § 309(a) (1976). Where there are material questions of fact, a hearing must be held. 47 U.S.C. § 309(e) (1976).

In sum, the Act prohibits the Commission from relegating the public interest determination to the marketplace, and specifically imposes upon it the duty of making a public interest determination, including holding a hearing, where necessary, when it considers each individual license application.

In its *Policy Statement*, as in its prior format cases, the Commission has acted in direct violation of this clear statutory mandate. Its total reliance on marketplace forces flies in the face of the language in *RCA*, which limits the agency to "drawing on competition for complementary or auxilliary support. 346 U.S. at 94. Its absolute refusal to weigh the effect of the loss of a unique format on the diversity of programming available to the public,[65] even where it concedes that the marketplace has failed, violates section 309(a) of the Communications Act. Its refusal to hold a hearing where there are material questions of fact regarding the effect of that prospective loss of diversity on the "public interest, convenience and necessity" violates Section 309(e) of the Act.

The decision of the Court of Appeals below, and the format decisions *WNCN* reaffirmed, drew heavily on this Court's decisions in, *e.g.*, *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), *NBC, RCA, and*

[65] Diversity of programming and the inclusion of unique formats within the concept of such diversity are concededly within the public interest standard. *See* p. 18, *supra*; FCC App. 71a.

Red Lion. The Court of Appeals did no more than reiterate the Commission's duty to make its own public interest determination[66] in narrowly defined circumstances, where the marketplace had failed to provide the diversity of programming inherent in the public interest standard.

Accordingly, as the Court of Appeals decision is clearly premised in the Communications Act, and in accord with all of this Court's relevant interpretations of that Act, there is no need to grant review in the instant case.

II

The Decision of the Court of Appeals Is Entirely Consistent with This Court's Explication of the First Amendment in the Broadcasting Context

The very same decisions of this Court which define the Commission's duty under the Act to select and regulate licensees in the public interest, establish clearly that the First Amendment does not prohibit the Commission from basing its public interest determinations in part upon the program proposals of applicants and the past programming of licensees. The holdings of these cases are summarized in *Red Lion*, which is completely dispositive here:

> "Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U.S.C. § 301. Unless renewed, they expire within three

[66] Thus this case is entirely distinguishable from *NCCB*, where the Commission refused to adopt a retroactive across-the-board rule requiring divestiture, but left open the possibility that in individual renewal applications of grandfathered combinations, the diversity issue would, if raised, be considered in making the requisite public interest finding. Unlike *NCCB*, the Court here has mandated no result; it has required only that the Commission employ its discretion in making the inquiry.

years. 47 U.S.C. § 307(d). The statute mandates the issuance of licenses if the 'public convenience, interest, or necessity will be served thereby.' 47 U.S.C. § 307(a). In applying this standard the Commission for 40 years has been choosing licensees based in part on their program proposals. In *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933), the Court noted that in 'view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses.' In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet those needs; moreover, if needs or programs shifted, the Commission could alter its allocations to reflect those shifts. *Id.*, at 285. In the same vein, in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138 (1940), the Court noted that the statutory standard was a supple instrument to effect congressional desires 'to maintain...a grip on the dynamic aspects of radio transmission' and to allay fears that 'in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.' Three years later the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format

and the kinds of programs broadcast by licensees. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)."

395 U.S. at 394-95. Thus, as *Red Lion* holds:

> "No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.' *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943).
>
> "By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."

Id. at 389. The principles enunciated in *Red Lion* were most recently reaffirmed and applied in *NCCB*, where this Court held that it was not a violation of the First Amendment to deny licenses to, or even to require divestiture by, newspaper owners, where that has been found necessary to serve the public interest. 436 U.S. at 798-802.

This Court has also recently definitively concluded that the "anticensorship" provision of the Act, 47 U.S.C. § 326 (1976), does not "deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties." *FCC v. Pacifica Foundation*, 438 U.S. 726, 735-37 (1978). This decision

completely rebuts petitioners' reliance[67] on Section 326. As the Court of Appeals stated, the suggestion that *WEFM* would empower the Commission to impose censorship "is to stretch *WEFM* virtually beyond recognition." *WNCN*, FCC App. 26a.

As the Court of Appeals pointed out,[68] the Commission's portrayal of *WEFM* as requiring "pervasive governmental regulation"[69] and "continuing state surveillance"[70] in fact bears little resemblance to what that and the other format cases held.[71] Under the Court of Appeals decision, licensees are neither prohibited from broadcasting, nor required to broadcast, any particular programming or program format;[72] nor are they required to provide access to non-licensees.[73]

Rather than militating against the decision of the Court of Appeals, the First Amendment, as elucidated in this Court's broadcasting decisions, actually supports

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[67] *See* FCC Pet. 18 n. 13; NAB Pet. 11, 20-24; Insilco Pet. 21; ABC Pet. 14-15.

[68] *WNCN*, FCC App. 23a-26a.

[69] *Notice of Inquiry*, FCC App. 65a.

[70] *Policy Statement*, FCC App. 134a.

[71] The Commission's characterizations border on the ridiculous, since *WEFM* only held that in extremely limited circumstances, the Commission might be required to review a licensee's past programming in the context of a license renewal or assignment application. This is a far cry from the kind of day-to-day meddling in licensees' journalistic discretion which was envisioned as a possible result of the access scheme proposed in *CBS*.

[72] *WNCN*, FCC App. 25a-26a. Since this is not a scheme for allocating formats to broadcasters nor of assessing the relative value of formats, petitioners' references to the legislative history of § 326 of the Act, NAB Pet. 15-16 n. 19; Insilco Pet. 20-21; ABC Pet. 14-15; are of no relevance to this case.

[73] *WNCN*, FCC App. 26a. Petitioners' attempts to analogize this case to such decisions as *CBS* and *FCC v. Midwest Video Corp.*, ____U.S. ____, 99 S.Ct. 1435 (1979) are thus inappropriate.

and, indeed, compels it.[74] Accordingly, since the Court of Appeals decision falls squarely within this Court's prior holdings, the petitions for certiorari should be denied.

III

Because of the Violations of the Administrative Procedure Act and Fundamental Fairness, the Commission's Decision May Not Be Reinstated, and the Record Provides an Inadequate and Inappropriate Basis for This Court's Review

As this Court has recently held, the "adequacy" of a record to support an agency's findings

> "...turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes." *Vermont Yankee Nuclear Power Corp. v. Natural Resources*

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[74] As this Court held in *Red Lion*:

"[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-362 (1955); 2 Z. Chafee, Government and Mass Communications 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)....It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." 395 U.S. at 389-90.

Defense Council, 435 U.S. 519, 547 (1978) ("*Vermont Yankee*").[75]

The applicable section of the Administrative Procedure Act, 5 U.S.C. § 553 (1976), requires a three-step procedure in agency rulemaking; notice to the public, an opportunity for interested parties to comment, and a decision based on "consideration of the relevant matter presented." Within this three-step procedure, the notion of fundamental fairness is entirely applicable, since

> "...the reviewing court must satisfy itself that the requisite dialogue [between the agency and the public] occurred and that it was not a sham." Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375, 381 (1974) (hereinafter "Wright").[76]

It is well settled that the "comment" requirement of Section 553 includes an opportunity to rebut, challenge or otherwise speak to all relevant material *prior* to the agency's decision.[77] *See, e.g., Wright, supra* at 379-81;

[75] This is consistent with the position taken by, *e.g.*, the Fifth Circuit, which wrote that in reviewing agency determinations, the primary function of courts is not to insure correct decisions, but to preserve the integrity of the decision making process. *Bowman Transportation, Inc. v. United States*, 569 F.2d 912, 923-24 (5th Cir. 1978).

[76] The Wright article was cited with approval in *Vermont Yankee*, 435 U.S. at 547 n. 20.

[77] This interpretation of the "comment" requirement of the A.P.A. in no way conflicts with *Vermont Yankee*. A footnote in that opinion is a statement by the Nuclear Regulatory Commission describing the procedures used, the fact that no evidentiary material would have been received under different procedures, and the further fact that the petitioner had made not even a suggestion of what other substantive matters it might develop under another procedure. Not only were all documents made available well in advance of the hearing, the staff also made available its drafts and handwritten notes. Compare this with the deliberate withholding of information in the instant case. *Id.* at 530 n. 7.

Davis, *Administrative Law in the Seventies* (1976) § 601-1-1 (Supp 1977); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 249-52 (2d Cir. 1977); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1259-61 (D.C. Cir. 1973).

Once data, or conclusions from data, or any study are "relied" upon by the agency, the participants must be furnished with that material as soon as it is practicably available, *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973), *Cert. denied*, 417 U.S. 92 (1974), and must be given an opportunity to analyze and comment on the material as well as to challenge or otherwise comment upon the methodology employed in obtaining it. *E.g., International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973); *South Terminal Corp. v. EPA*, 504 F.2d 646, 664, 666 (1st Cir. 1974).

In the instant case, as the Court of Appeals more gently noted, the Commission flagrantly violated both the letter and the spirit of the A.P.A. - as well as the most basic notions of due process - by failing to reveal the information upon which it ultimately relied in making its determination.[78] This fundamental error was exacerbated

[78] There can be no substantial question as to the importance of the "secret studies" to the Commission's decision. As the Court of Appeals found:

> "Even a brief perusal of the *Policy Statement* reveals that the staff study, which was issued as Appendix B thereto, had a major influence on the decision. The Commission cited it in the body of the *Policy Statement* as showing 'decisively... how effective the tool of competition has been in carrying out Congress' plan for entertainment programming'; as supporting the conclusion that 'the marketplace is the best way to allocate entertainment formats in radio'; and as strongly indicating that listeners carefully discriminate among stations programing the same format." FCC App. 14a (footnotes and citations in footnotes omitted).

both by the Commission's repeated reassurances to public interest groups *prior* to the decision that no studies were needed or contemplated,[79] and by its failure to provide necessary information to permit any meaningful comment on the studies *after* its decision.[80]

The Court of Appeals did not find it necessary to rely on the "secret studies" issue in overturning the decision [81] only because the Court saw it as symptomatic of even "broader defects" which were fatal to the Commission's action.[82]

Respondents believe that under the A.P.A. and this Court's decision in *Vermont Yankee*, an agency decision may not be upheld where it has been made in a

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[79] These "reassurances" were made in response to various pleadings filed by the public interest groups. *See* Counterstatement, *supra* at p. 14.

[80] No information about the studies was provided until after the period for filing reconsideration petitions had passed, although requests were promptly and properly made. The Commission refused to reopen the record to permit comment although specifically requested to do so (*see* pp. 15-17 *supra*), and ultimately denied reconsideration, continuing to rely on the untested studies (FCC App. 183a, 191a). Compare this situation with that in *Vermont Yankee* where this Court wrote

> "...ACRS was not obfuscating its findings. The reports to which they referred were matters of public record, on file in the Commission's public document room...not *one* member of the supposedly uncomprehending public even asked that the report be remanded." 435 U.S. at 556-57.

[81] Judge Bazelon, concurring, found this an independent ground for reversal. *See* FCC App. 41a.

[82] As previously stated, respondents reserve the right to argue all the procedural irregularities and A.P.A. violations which not only made the decision below unfair, but which demonstrate that the decision itself was irrational and ultimately unsupportable.

procedure so flagrantly violative of the statute and fundamental fairness.[83]

In addition, the "secret studies" and other violations of the A.P.A. permeate and poison this record in such a way that if review were granted, the "substantive" issues might well never be reached.

Even assuming *arguendo* that the Commission has presented this Court with issues which should be reviewed, it has not created an adequate or fair record upon which review can be based.[84] Accordingly, certiorari must be denied.

IV

The Present Case Is of Insufficient Importance to Warrant the Grant of Certiorari

As FCC Commissioner Fogarty stated in dissenting from the Commission's decision to petition this Court for certiorari:

> "Any fair reading of the court's *WNCN* opinion indicates that format change hearings are likely to be few in number and that the Commission retains ample leeway and discretion to avoid any 'administrative nightmare' or collision with the First Amendment." 2a.

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[83] As Commissioner Fogarty wrote in voting against the Commission's determination to seek certiorari here, the "secret studies" issue not only

> "is a fatal flaw in any case for certiorari"

but also

> "goes to the integrity and fairness of the Commission's decision making process." (1a-2a).

[84] In this respect the instant case is also entirely distinguishable from prior cases where this Court has reviewed Policy Statements issued by the Commission. In none of those cases was there

> "...any claim that the Commission failed to observe procedural safeguards required by law" *NBC*, *supra*, 319 U.S. at 225.

Both of Commissioner Fogarty's points, the infrequency of occurrence of the format issue, and the Commission's ability to deal with the issue as it arises, are amply supported by the record.[85] Both supply independent grounds for the denial of certiorari in this case.

Further, as the Commission recognizes,[86] there is no possibility of a conflict in the Circuits, since under 47 U.S.C. § 402(b) the D.C. Circuit is

> "...the sole forum for appeal from FCC licensing decisions" *WEFM, supra*, 506 F.2d at 266.

This consideration also militates against the need for this Court's review.

[85] As already stated, in the decade since the decision in *Atlanta*, only four format cases have reached the Court of Appeals, and only one has resulted in a hearing. Since only about "half a dozen" cases raising format change issues are pending before the Commission, the direct impact of *WNCN* is, given the general scale of cases decided by this Court, exceedingly small.

Additionally, the Court of Appeals' enormous solicitude for, and deference to, Commission discretion in making the requisite public interest determination surely makes that statutorily created burden an easily bearable one.

[86] *See* FCC Pet. at 14, n. 8.

Conclusion

For the reasons stated above, the petitions for certiorari should be denied.

Respectfully submitted,

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APPENDICES

Appendix A

Dissenting Statement of Commissioner Joseph R. Fogarty

In Re: Decision to Seek Supreme Court Review of *WNCN Listeners Guild* v. *FCC*.

For the following reasons, I dissent to the Commission's decision to seek Supreme Court review of *WNCN Listeners Guild* v. *FCC*:[1]

First, the procedural infirmity inherent in the Commission's failure to afford notice and opportunity for comment on the so-called OPP "Secret Study" is a fatal flaw in any case for certiorari. As Judge Bazelon stated in his Concurring Opinion:

> The Commission's failure to make public the staff study that proved so central to its final decision violates fundamental rulemaking principles. As the majority opinion documents, the FCC exhibited an almost cavalier disregard for the public's right to comment on the critical data and methodology supporting the Commission's finding that "market forces had provided a significant even if not perfect amount of diversity." This conclusion in turn is a vital link in the Commission's reasoning underlying its adoption of the *Policy Statement*....the record must be reopened to permit meaningful public participation in the Commission's decision.[2]

I was unaware of this procedural defect when I first participated in the matter of the *Policy Statement* on reconsideration, and I must agree with the court's concern.

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[1] No. 76-1692 (D.C. Cir., en banc, decided June 29, 1979) ("Format Change" Case).

[2] Concurring Opinion of Bazelon, J. at 1 (footnotes omitted).

Appendix A

Dissenting Statement of Commissioner Joseph R. Fogarty

The failure to give public notice and opportunity for comment on the OPP study was not merely harmless error; that failure goes to the integrity and fairness of the Commission's decision-making process. As Judge Leventhal succinctly observed, this infirmity cannot be remedied by the "repair carpentry" of Commission counsel on appeal.[3]

Second, on the merits, I believe that if the Commission's statutory mandate to encourage the larger and more effective use of radio in the interest of all the people of the United States[4] has any substantive meaning, it dictates that the Commission must interest itself in the potential loss of a unique program format which has been responsive to the needs and interests of a substantial segment of the community. Any fair reading of the court's *WNCN* opinion indicates that format change hearings are likely to be few in number and that the Commission retains ample leeway and discretion to avoid any "administrative nightmare" or collision with the First Amendment. If the Commission were now to spend half as much time trying to live with the format change decisions as it has spent trying to circumvent the court's mandate, I have no doubt that we could find satisfactory procedures to minimize the parade of horribles that the *Policy Statement* has conjured up.

Third, I do not believe that *WNCN* and its predecessor cases will have any negative impact on the Commission's intended inquiry into radio deregulation. Reasonably construed, the *WNCN* decision holds that the Commission

[3] Concurring Opinion of Leventhal, J. at 2 (footnote omitted).

[4] 47 U.S.C. 151 and 303(g).

Appendix A

Dissenting Statement of Commissioner Joseph R. Fogarty

must intervene in the broadcast marketplace only where there is an identifiable marketplace failure inimical to the public interest. It is my understanding that this is the reasoned and pragmatic approach that we will be taking in addressing radio deregulation, and I therefore believe that *WNCN* is supportive of, rather than detrimental to, that endeavor.

Finally, it is painfully obvious to me that an overwhelming majority of the Court of Appeals en banc views the Commission's course of conduct with respect to the format change decisions as obstreperous, disrespectful, and in flagrant disregard of the constitutional principle of judicial supremacy. I wish to have no part in this needless and unseemly confrontation.

Appendix B

Statutes Involved

47 U.S.C. § 309 (a), (d), (e)

Application for license-Considerations in granting application

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

Petition to deny application; time; contents; reply; findings

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain

Appendix B

Statutes Involved

specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

Hearings; intervention; evidence; burden of proof

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters

and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

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47 U.S.C. § 310(d)

Assignment and transfer of construction permit or station license

(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.